In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-426

OLGA COREY, PETITIONER

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Neither the district court nor the court of appeals rendered an opinion. The decision of the Civil Service Commission's Board of Appeals and Review appears at Pet. App. 3-7; the letter decision of the Civil Service Commission appears at Pet. App. 8.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1972. The petition for a writ of certiorari was

filed on September 13, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the "notice of proposed adverse action" given the petitioner adequately apprised her of the grounds for her dismissal.

2. Whether petitioner's dismissal from a sensitive position based upon the deliberate falsification of her employment application was improper.

3. Whether communication between the instigating officer and a reviewing officer concerning only the procedural aspects of petitioner's removal hearing violated the Department of Justice regulations requiring a full and fair hearing.

STATEMENT

Petitioner, prior to her dismissal on November 14, 1966, was employed as a Public Information Specialist in the Community Relations Service of the Department of Justice.

In 1947 petitioner was arrested, convicted, and placed on probation for stealing a suitcase. In 1964, she sought employment with the Department of Health, Education, and Welfare (HEW), and was required to complete Standard Form 57, which contained a question as to whether she had ever been arrested, held, or charged by any law enforcement authority. Petitioner indicated that she had not. Despite a specific bold-print warning on each form that false or dishonest answers to any questions may be grounds for dismissal, petitioner signed the certification stating that all the statements made by her in the application were correct and true.

In June 1965, during an interview with two officials of the Office of Internal Security for HEW, petitioner admitted her arrest. Both officials warned her of the gravity of making false statements on government applications, and she promised to disclose the arrest on any future application.

Less than three months later petitioner submitted an application for employment with the Department of Commerce, and again failed to disclose her arrest. She was hired in the Community Relations Service as a temporary employee in a position that required security clearance.[1] Five months later, when the Department discovered the falsification and learned of the prior warning, petitioner was notified in writing that the Department proposed to remove her from her position. The notice stated in part:[2]

> Your answer to this question was knowingly false since in an interview with representatives of the Department of Health, Education and Welfare, your previous employer, you were questioned about your failure to list this arrest on appropriate government forms. During that interview, which took place on June 15, 1965, you volunteered that you would make certain that details regarding your arrest would be set forth in all appropriate government forms you might fill out in the future. In spite of this, you filed a SF-57, Application for Government Employment, with the Community

[1] The Community Relations Division was later transferred to the Department of Justice.

[2] The full text of the notice is set forth in the Appendix to this brief, pp. 9-11, *infra*.

Relations Service approximately three months later and again gave a negative answer to question 37.

In the administrative proceedings, petitioner contended that the false statements concerning her arrest were not material and that if the true answers had been known the information would not have disqualified her for employment. After a full hearing, a special hearing officer determined that petitioner's false statements were both material and intentional, and recommended her dismissal. An appeal to the Deputy Attorney General was denied on the merits. Petitioner then appealed to the Appeals Examining Office of the Civil Service Commission, which set aside petitioner's removal. The Commission's Board of Appeals and Review sustained this decision, but the Department's request to reopen and reconsider was granted by the Commissioners of the Civil Service Commission.

The Commissioners found that the false statement was intentional because it was made by petitioner "just a few months after she was admonished by another agency about the same false answer," and that the falsification was material in light of "the sensitivity of her position and the recent warning regarding the seriousness of the offense." The Commission determined that petitioner need "not be retained in a position which required of the incumbent a high level of good judgment, discretion, integrity and trustworthiness." (Pet. App. 8.) Both the district court and the court of appeals upheld the Commission's decision.

ARGUMENT

The decisions below are correct and review by this Court is not warranted.

1. Petitioner contends that her removal was initiated upon a basis different from that on which the Civil Service Commission sustained it, and that she had no opportunity to meet the assertion that her intentional falsehood was material to her integrity and trustworthiness. The written notice of the proposed removal, however, plainly stated the facts upon which the dismissal was sought and upheld (see pp. 9-11, *infra*), and it complied with 5 C.F.R. Part 752.[3] Moreover, petitioner presented seven testimonials concerning her good character, honesty, and trustworthiness, and she sought an appeal of her dismissal on the ground that "the evidence of record established that the employee served the interest of the Department of Justice with efficiency and integrity."[4] Thus, even if the notice had been deficient, petitioner understood the reasons for her dismissal and sought to rebut the natural implications concerning her integrity and trustworthiness. In these circumstances, she cannot be heard to complain of lack of notice. See *McTiernan* v. *Gronouski*, 337 F. 2d 31,

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[3] At the time the letter was sent in March 1966. 5 C.F.R. (Rev. 1964) 752.202 provided in part:

> (a) *Notice of proposed adverse action.* * * * [A]n employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.

This provision has been carried forward and now appears as 5 C.F.R. 752.202(a)(1).

[4] Letter requesting appeal to Deputy Attorney General, November 18, 1966, p. 2.

38 (C.A. 2); *Baughman* v. *Green*, 229 F. 2d 33, 34 (C.A. D.C.); *Mulligan* v. *Dunlap*, 108 F. Supp. 296 (D. D.C.).

2. Petitioner next argues that, even though the intentional falsification of her application form may have reflected upon her integrity and trustworthiness, removal was improper because the 1947 arrest would not have precluded her employment had she revealed it. The Civil Service Commission, however, properly concluded that intentional falsification of an employment application was material to an employee's qualifications for a sensitive position requiring a high degree of trustworthiness (Pet. App. 8).

This conclusion is in accord with settled principles. For example, in *Harrison* v. *McNamara*, 228 F. Supp. 406 (D. Conn.), affirmed *per curiam*, 380 U.S. 261, an employee was removed from a sensitive position for giving false answers to three questions, including one concerning past arrests, on his government employment application. The employee challenged the removal on the ground that the true facts would not have justified refusing him employment, but the three-judge district court sustained the dismissal, stating that the employee "was discharged because of his false answers, and not because of his past activities in themselves," and that "the truthfulness of a man is material in estimating his reliability" (228 F. Supp. at 408). Similarly, in *Rodriguez* v. *Seamans*, 463 F. 2d 837 (C.A.D.C.), the court upheld the removal of a government employee for false statements in an application, because regardless of whether the true facts could properly have justified denying him employment, "falsification of records [is] an act which goes to appellant's

reliability, veracity, trustworthiness, [and] ethical conduct * * *'" (463 F. 2d at 842-843).[5]

3. Petitioner complains that certain "ex parte communications regarding the proposed removal" violated her right under Department of Justice regulations to a full and fair hearing before impartial hearing officers (Pet. 11-12). The record shows that the officer bringing the charge discussed with the Assistant Attorney General and the Acting Attorney General, who later served as a reviewing officer, certain procedural aspects of the removal proceeding. At the time petitioner was notified of the proposed removal, the Community Relations Service was in the Department of Commerce, whose regulations entitled an employee to a hearing only after the dismissal. The day after petitioner's removal, the Service was transferred to the Department of Justice, whose regulations required a hearing *prior* to dismissal. The subject of the discussion among the officers was which regulations should govern in petitioner's case.[6]

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[5] *Costello* v. *United States*, 365 U.S. 265, and *Chaunt* v. *United States*, 364 U.S. 350, relied on by petitioner, both involved the statutory standards for revoking citizenship for fraudulent procurement, and both are inapposite. We are dealing here with removal from sensitive government employment, not with the setting aside of a naturalization decree, which touches upon " 'the whole nature of our Government and the duties and immunities of citizenship' " (364 U.S. at 353).

[6] See the transcript of the hearing before the Civil Service Commission's appeals examiner, pp. 5-41, and defendants' answers to interrogatories 2 and 3 in the district court. As a result of the discussion, it was decided to revoke petitioner's dismissal, to reinstate her with full back pay, and to afford her a hearing prior to dismissal under the Justice Department regulations. See Pet. App. 4.

All the officers have stated, under oath, that they never discussed the merits of petitioner's case, and petitioner has presented no evidence to the contrary. Thus, while private communications between decision-making officials concerning the merits of a case may be grounds for overturning the dismissal of an employee (*Camero v. United States*, 375 F. 2d 777, 780 (Ct. Cl.)), the uncontroverted affidavits of the officers here show that the communications did not relate to the merits of petitioner's case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HARLINGTON WOOD, JR.,
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Attorneys.

NOVEMBER 1972.

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APPENDIX

U.S. DEPARTMENT OF COMMERCE

COMMUNITY RELATIONS SERVICE

WASHINGTON, D.C. 20230

OFFICE OF THE DIRECTOR March 4, 1966

Miss Olga Corey
730 24th Street, N.W.
Washington, D.C.

Dear Miss Corey:

In accordance with the provisions of Part 752, Subpart B, of the Civil Service Rules and Regulations, this will notify you that I propose to remove you from your position of Public Information Specialist, Office of Media Relations, Community Relations Service, not earlier than 30 days from the receipt of this notice. The charge against you is falsification of the Standard Form 57, Application for Federal Employment, which you filed with the Community Relations Service when you applied for the position you now hold.

The above charge is based on your negative answer to question 37, "Have you ever been arrested, taken into custody, held for investigation or questioning, or charged by any law enforcement authority?" An investigation has brought out that you were arrested by the Milwaukee, Wisconsin, Police Department on July 26, 1947 for larceny. Your answer to this question was

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knowingly false since in an interview with representatives of the Department of Health, Education and Welfare, your previous employer, you were questioned about your failure to list this arrest on appropriate government forms. During that interview, which took place on June 15, 1965, you volunteered that you would make certain that details regarding your arrest would be set forth on all appropriate government forms you might fill out in the future. In spite of this, you filed a/ SF-57, Application for Government Employment, with the Community Relations Service approximately three months later and again gave a negative answer to question 37.

You have a right to reply personally, in writing, or both, to this notice of proposed removal and to show cause why this action should not be taken. Your reply must be made within ten (10) calendar days from the date of receipt of this notice. Consideration will be given to extending this period if you submit a written request stating your reasons for needing more time. Your reply should be directed to Richard Adams, Administrative Officer, Community Relations Service, U.S. Department of Commerce, Washington, D.C. 20230. If you wish to reply in person, you may call Mr. Adams on 386-5413 to arrange an appointment.

Your reply will be given full and careful consideration, and no decision will be made until after the time allowed for your reply. As soon as possible after your answer is received, or after the expiration of the ten (10) calendar day limit if you do not answer, a written decision will be given to you.

You will be continued in a duty status during the

notice period unless you request to be carried in a leave status.

Sincerely,

/s/ Roger W. Wilkins
ROGER W. WILKINS

☆ U.S. Government Printing Office: 1972—487-064/281